DOES THE COURT EVER WRITE A WILL FOR THE TESTATOR?

A recent text-book on "Wills" says (and the remark has a familiar sound):

"In construing a will the court has no intention to make a will for the testator, or to attempt to improve upon the will which the testator actually made."[1]

Occasionally one comes across an opinion where the learned Justice asseverates that the court cannot sustain an interpretation asked for, because to do so would be not to construe the will, but to write one—"and this the court cannot do." Lawyers are aware that no such power dwells in any court; but, after all, is it absolutely correct to declare of courts that they are never guilty of doing this very thing?

Our purpose in the present article is to set on foot an enquiry as to whether judges engaged in the task of construing a testator's language do not actually work out, in some instances, a result which amounts to little else than giving efficacy to the court's own idea of what the testator probably would approve, although as a matter of fact such is not his will. We do not mean to ask if a court (even of the highest reputation) does not at times fall into error. We are seeking to discover whether it be not a fact that judges not infrequently have substituted their own conception in place of that which the testator must have entertained, so that to all intent and purpose they are writing a will for him. We do not wish to intimate—we take leave to protest—that any judge ever avowedly does so. What we do observe is, that during the process of getting at the intention of a testator, the judicial examiner is seen at times to drift away from what the testator has written. Wigmore calls attention to a remark of Dallas, *C. J.*, in *Pocock* v. *Lincoln*,[2] to the effect that "if not in a majority of wills, yet certainly in a great number, the construction is contrary to the probable intent.[3]

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[1]"A Concise Treatise on the Law of Wills," by William Herbert Page (1901) p. 537.

[2](1821) 3 B. & B. 27, 46.

[3]Wigmore, Evidence (Vol. IV) p. 3478.

It is not necessary to explain that what we are about to state is set down in no spirit of animadversion. We have no particular court and no special case in mind. We are merely indulging in a little speculation as to whether the profession realizes that the courts do, as a matter of fact, now and then write a will, although they take pains to assure us that they have neither the power nor the wish so to do.

We disclaim, of course, possessing any special gift of insight into the workings of the judicial mind. Never having occupied a seat upon the bench, we have no secrets of the consultation-room in our keeping. By what successive steps in a given case the judges arrive at their decision, we know not. We can only do what the profession generally does—base a surmise upon what a study of the opinion, in the light of argument from counsel, shall chance to reveal.

Happening of late to be interested in the subject of the judicial interpretation of wills, we fell to contemplating the environment under which a court of last resort commonly proceeds in order to settle a dispute arising over the meaning of words employed by a testator. Inasmuch as the Society for Psychical Research has not as yet made it possible to obtain an explanation from the testator himself, parties of antagonistic interests, who conceive themselves entitled to share in the estate of the deceased, are still compelled to ask the court to tell them what the "sound and disposing mind" was thinking of when it put on paper the terms that have brought on a controversy.

The testator, let it be remembered, enjoyed in his lifetime no natural right to determine what should become of his estate after death. The right to make a will is conferred by statute. The right of the heir-at-law and the next-of-kin to inherit where there is no will is just as firmly fixed by the law. Whoever would exercise the privilege of giving away his property by a last will and testament must conform to all the conditions that the legislature has seen fit to impose. The instrument must be in writing, duly signed and witnessed. Surely, it is no hardship for him who desires to change the devolution of his property upon his decease from his heirs or next-of-kin, to be required to specify in plain and simple words that which it is his wish shall be done with it.

To be plain and simple of speech, however, is not easy. Many a well-educated person is unable to say what he means so readily as can the man who is not even able to write his name. The law

is lenient in respect to infelicity of wording; is tolerant of an obscurity of meaning. Wills are often drawn up and executed in haste. Many wills are written by persons who have never known how to express themselves with either clearness or precision. The law, therefore, says that a testator's wishes, if not aimed at what is illegal in character, shall be carried into effect, wherever the court can be reasonably assured of what those wishes are.

The troublesome question presents itself, what did J. S. mean by employing this language? Ready enough would be the answer, were the judge at liberty to announce that J. S. meant what he (the judge) would have done had he been J. S. A first step is to ascertain who J. S. was, and what position he occupied toward the rest of mankind when he signed his name to his last will. As the court is led often to remark, we are to put ourselves as far as possible, in the place of J. S. at the date when he executed the instrument in question.

Much is heard by the layman about the "intention of the testator." It is a phrase in constant use. Nothing sounds more cheering than the words "the testator's intention is the pole-star." At first blush it looks simple enough. All one has to do, it appears, is to see what the testator intended and follow out his directions. Unfortunately, in the case at bar, the testator, or the lawyer who prepared the will, had managed to jumble things together in such confusion that it becomes a puzzle to guess what in the world can be the true meaning. Let us suppose, however, that the language under review is fairly intelligible, and yet not certain. More or less doubt, we perceive, attaches to some portions of the will. How is that doubt to be dispelled?

In all causes alike, no matter what may be the nature of the question involved, the judge strives to do exact justice to the parties. When the record is made up there shall not be a scintilla of favor shown to one side more than to the other. The judge makes an honest effort (in which he generally succeeds) to pass upon the question in his own mind just as if it had been presented in the abstract. Never has a happier expression been given to this foundation principle than is contained in the words of Rufus Choate, in his famous speech upon the question before the Massachusetts Constitutional Convention, as to the election of judges:

"He shall know nothing about the parties, everything about the case. He shall do everything for justice; nothing for himself; nothing for his friends; nothing for his patron; nothing for his

sovereign * * * To be honest, to be no respecter of persons is not yet enough. He must be believed such."[4]

All this is so much a matter of course that perhaps it has been superfluous to mention it.

In one respect, a case involving the construction of a will differs from other classes of cases. The procedure is chiefly confined to an enquiry into facts. It seeks explanation of a set of words whose precise counterpart, under exactly similar conditions of time, place and parties interested, is almost impossible of recurrence. From such effort on the part of the court, there is absent that wholesome restraint which grows out of the circumstance that the decision about to be rendered may become a precedent. We term the restraint "wholesome," because it not only acts as a caution, but serves to narrow the field wherein, for the time being, the court moves in the performance of its duty.[5] This restraint is to a large extent, if not entirely, removed when the court sees that whichever way it shall decide the pending cause, no one is likely to be affected other than the parties to the record. The duty that the judges have in hand, in construing the meaning of a will, leads them into the field of speculation. Whatever conclusion they reach, their finding will probably never be cited as authority.[6] As a result we find in this class of cases a freedom of action which more than once has led to a decision by no means satisfactory in point of logical reasoning.

A keen-sighted and learned text-writer, who has permitted himself to indulge in a rather free criticism of decisions (partly no doubt because having long sat with distinction upon the bench, he had gathered from experience a knowledge of how easy it is to fall into error) has remarked of cases that deal with the subject of uncertainty in the language of wills, that they are "liable to be

[4]Not long since a distinguished member of the Supreme Court of the United States told me that when he takes up a case in conference it is no unusual thing for him to have forgotten who were the counsel that had argued it; more than once it has happened where a point of very great interest was up for decision he, thinking only of the law question involved, had lost all memory of the names of the parties to the record.

[5]The late Mr. Justice Strong of the Supreme Court of the United States once said in reply to a question of mine as to expressions he had used in a leading case upon the subject of the assignment of claims against the United States—"a judge, you know, has to write his opinion in a strait-jacket."

[6]Says Dunning (Lord Ashburton) with a frankness perhaps uncalled for: "The nonsense of one man can furnish no rule for understanding the nonsense of another." The expression is used by Hawkins, Principles of Legal Interpretation, printed in the Appendix of Thayer's Preliminary Treatise on Evidence at the Common Law, p. 604, note, where Professor Thayer furnishes the citation.

determined very much upon the taste or whim of the court."[7] This stricture, it is to be noted, was passed many years ago. Anciently the courts in treating of these cases indulged themselves in a latitude that would now be deemed extraordinary. Our author continuing informs us that there exists a

"very general feeling in all judicial tribunals whether in this country or in England, that the earlier decisions upon this point were many of them unreasonable and indefensible, and not a few of them verging very closely upon the ludicrous and the absurd."[8]

Where a testator undertakes to give money to a public charity it is apparent that there may be more or less danger of influences that affect the occupant of the bench all unconsciously in a direction which does credit to the heart while not strictly responsive to the demands of a cold, inexorable logic. This is the class of cases, we are led to suspect, where courts are most apt, if at all, to write a will for the testator.

Do courts actually yield to a temptation of this description in causes where the upholding of a bequest to charity is at stake? To put the question in another form: Does the heir-at-law receive at the hands of the court precisely the same consideration as does the benevolent institution which it was the cherished purpose of a testator to endow? Theoretically, to each party are accorded his full legal rights. The scales are held in perfect balance. We are persuaded, as is every lawyer, that practically, also, the two parties are treated precisely alike. That a court *ex industria* writes a new will for a. testator nobody believes. That a bias, more or less strong, exists in favor of sustaining, if possible, a public charity to the exclusion of the heir-at-law, few practitioners of experience are likely to deny. Strictly speaking, a court of justice favors nobody. In the eye of the law, and in the disposing mind of the judge, the heir is regarded with exactly the same measure of respect and consideration as the most deserving charity.

And yet, as he looks through the reports, one will find such observations as the following, which comes from a judge who is speaking of gifts to charitable uses. Courts, he says,

"give effect to them where it is possible to do so consistent with rules of law, and to that end the most liberal rules the nature of the case would admit of within the limits of ordinary chancery jurisdiction will be resorted to, if necessary."[9]

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[7] II. Redfield on Wills (3rd Ed. 1876)* p. 384.

[8] *Ibid.* *p. 385.

[9] *Per* Marshall *J.*, Harrington *v.* Pier (1900) 105 Wis. 485, at 504.

Here the judge is alluding to the *cy pres* doctrine, which in this country, where we have nothing that answers to the sign manual of the King, is a broad power that in some States is recognized as residing in the court of chancery.

The legislature may have conferred upon the courts a power to prefer a charity to the heir-at-law, so as to justify them in laying hold of slight reasons to sustain a gift made to charitable uses. Since the right to receive the property of a deceased person is only given by the State, there can be no room for finding fault in those jurisdictions where the power has actually been bestowed upon the courts. But in the absence of such grant of power, one is justified in a belief that the heir is entitled to be regarded with just as much favor as any charitable institution the testator may have had in mind. We will not be misunderstood when we say that it is in human nature to deem the charity more deserving than the heir. The doctrine of *cy pres* finds its support in this feeling. Yet it must appear to some minds that examples are by no means few where strict justice would seem not to have been exercised—to such an extremity has the doctrine of *cy pres* been pushed.

Indeed, the English doctrine of *cy pres* when applied with a free hand comes very near answering in the affirmative the title-question of this article. Says Grant, M. R.:

"Whenever a testator is disposed to be charitable in his own way, and upon his own principles, we are not to content ourselves with disappointing his intention, if disapproved by us; but we are to make him charitable in our way and upon our own principles. If once we discover in him any charitable intention, that is supposed to be so liberal as to take in objects not only within his intention but wholly adverse to it."[10]

A testator had made a residuary bequest, for the purpose of educating and bringing up poor children in the Roman Catholic faith. The court held that the fund did not go to the next-of-kin as a bequest for an unlawful purpose, but that it remained in the disposition of the crown for some other charitable use. Plainly this is to write a new will. It is difficult to perceive that unless sanctioned by positive legislation, courts upon principle have the right to send a testator's property in any other direction for charity than that which he has named. The theory that there is a general intent for charity which the court may lay hold upon and

[10]Cary *v.* Abbott (1802) 7 Ves. 490, at 495.

thereby bring out a different result, does not, we think, commend itself to every careful reader.[11]

The history of the *cy pres* doctrine in England shows that at first it met with great opposition. We are not complaining that this doctrine has secured a firm foot-hold in so many of the States of the Union. Wherever it is the law, it is to be taken for granted that it works well. Substantial justice, no doubt, results from its free application.[12]

If the reader would care to examine a remarkable case of the application by the court of the doctrine of *cy pres* so as to provide a new clause in the will, in the place of that written by the testator, let him turn to *Edgerly* v. *Barker*.[13] The testator had given real and personal property in trust for grandchildren, the period of

[11]Consult an interesting historical article by Joseph Willard in 8 Harvard Law Review, 69-92, showing that the *cy pres* doctrine originated in the conception of an early period that by a pious donation the testator pays his price to Heaven. The key-note of this learned disquisition is sounded in an extract from Wilmot, *C. J.*, in Attorney-General *v.* Downing (1767) Wilmot Notes, 1, 33:—"The court thought one kind of charity would embalm his memory as well as another, and being equally meritorious, would entitle him to the same reward."

[12]Massachusetts is a commonwealth where numerous rich men and women have from time to time given noble bequests to charity. It has been fortunate for the cause of humanity that the courts of that State saw their way plain to exercise the right of *cy pres* in order to carry into effect the generous purposes of many a wealthy testator. But when the result is regarded in the leading case of Jackson *v.* Phillips (1867) 14 Allen 539, the elaborate opinion in which, by GRAY, *J.*, is praised by Mr. Perry (Trusts, Section 724), some of us perhaps may not be entirely satisfied, although conceding that the case was correctly decided. The testator made bequests to trustees to be expended in the circulation of books, newspapers, the delivery of speeches, lectures and such other means as in their judgment would create a public sentiment to put an end to negro slavery in the United States, and for the benefit of fugitive slaves, etc. When the will took effect, slavery had been abolished. The court founded its judgment on the ordinary right and duty of courts to *construe written instruments* and to carry into effect the intention of the parties. It reasoned that the testator had in view the welfare of the negro. Accordingly as the particular purpose could not be accomplished, the Court would devise a scheme.

The trustees, it seems, had expended a part of the $10,000 before a question arose as to the validity of the gift. While the report is silent as to the direction of this expenditure, it looks as if the money had gone to support the *Anti-Slavery Standard,* a newspaper published in New York: The master to whom the case was referred, recommended that the remainder of this money be given to the New England branch of the Freedmen's Union Commission for the education of the freedmen, and the court so directed.

This disposition of the fund may have been perfectly agreeable to the parties to the record. All the same, it does seem as if the court were writing a will for Mr. Jackson. He gave his money for a specified purpose. We are unable to escape the conclusion that upon principles of exact justice, the money should have gone to the next-of-kin, as undisposed of by the will.

[13](1891) 66 N. H. 434.

distribution to be when the youngest grandchild should reach the age of forty years. The case presenting a question of perpetuity, recourse was had to Professor Gray, the distinguished author of the work on that abstruse subject. The Court of New Hampshire, under the lead of Chief Justice Doe, reduced the age from forty years to twenty-one, a drastic treatment which was accomplished by writing into the will a provision in direct contradiction of the plain language of the testator. Should the reader desire to ascertain what the eminent author (than whom no lawyer was better qualified to announce the correct rule of construction in respect to perpetuities) has to say, of Chief Justice Doe's method of writing a will for the testator, he will find an interesting article, written in pungent style, at page 242 of Volume IX of the *Harvard Law Review*.[14]

Before bringing this article to a close, we would say a word about the inherent difficulty that a court has to meet when it attempts to find out what a testator has actually intended by words that he has left behind him for the benefit of lawyers' pockets, and for the plague of the bench. A change has been going on in this domain of the law which will conduce, we think, to a more satisfactory quality of decisions. For years a serious divergence of opinion has existed between learned writers in respect to the fundamental rules of interpretation. Says Sir James Wigram (whose little book upon wills has been regarded as of the highest authority):

"The question in expounding in a will is not—What the testator meant? * * * but simply—What is the meaning of his words."[15]

A like idea is conveyed by Lord Eldon in language which is frequently quoted:

"The question is not so much what was the intention, as what, in the contemplation of law, must be presumed to have been the intention."[16]

[14]Consult Goodwin on Real Property, p. 299. Charles Doe was a forceful man. He did splendid work in driving technicalities and other like material for the law's delay out of New Hampshire. Judge Jeremiah Smith, in an able and discriminating sketch charmingly written, has said of the great Chief Justice (for he was truly great), "his one controlling desire in every case was to do exact justice, and if this end could not be accomplished save by setting at naught the so-called 'wisdom of our ancestors' he did not hesitate to go to that extremity." Memoir read before the Southern New Hampshire Bar Association (1897), p. 28.

[15]Wigram, Interpretation of Wills (2nd Ed.) 7; referred to in Thayer, Preliminary Treatise, etc., 582.

[16]Mills *v.* Farmer (1815) 1 Meriv. 55, 80.

So, Lord Denman:

"The question in this and other cases of construction of written instruments is not what was the intention of the parties; but what was the meaning of the words they have used."[17]

Of Wigram's statement, which has been time and again relied upon as authority in adjudicated cases, a later writer on the Construction of Wills has not hesitated to declare:

"There appears to be in this maxim a fallacy of no small importance."

Francis Vaughan Hawkins makes this comment in a valuable paper prepared for the Juridical Society on the Principles of Legal Interpretation with reference especially to the interpretation of wills.

With singular perspicacity this acute writer has pointed out what seems now to have become accepted as the true method of interpretation. He makes it plain that extrinsic evidence should be freely used whenever necessary to determine the intention of the testator. Although the procedure he supports is directly opposite to that indicated by Sir James Wigram, the reader, we think, will be satisfied that the views of Hawkins are sound. It is the sense in which a testator intended his words to be used, and not necessarily the meaning of the words themselves, that the court is to ascertain and announce as the ground of decision.

American lawyers are greatly indebted to the late James Bradley Thayer for his instructive chapters upon the principles of the law of evidence. One of the most valuable of these chapters is that entitled "the parol evidence rule," in which Professor Thayer sustains the method of constructing wills of which we have just spoken. It is Thayer who has brought anew to the notice of the profession in this country the lucid exposition of Hawkins.[18]

We know of no better illustration of what is to be considered the sound rule in this class of cases than will be found in the opinion of the Supreme Court of the United States in *Patch* v. *White*,[19] decided in 1886. A testator devised lot 6 in square 403, in the District of Columbia. He never owned that lot, but he did own lot 3 in square 406. At the trial testimony was offered to prove the facts of ownership, etc., but the judge excluded it and

[17]Rickman *v.* Carstairs (1833) 5 B. & Ad. 651, 663.

[18]He reprints the paper in the appendix to his book, Preliminary Treatise etc., p. 577.

[19]117 U. S. 210.

on appeal his ruling was affirmed by the court in general term, the Chief Justice dissenting. The Supreme Court Justices divided, five to four, in favor of reversing the decision below. The dissenting members of the court held to the old rule and declared that to admit parol evidence was to make a will for the testator. The profession generally, we think, were inclined at the time to side with the dissenting judges.

Professor Thayer cites this decision as an illustration of the soundness of the rule for which he had pointed out the reasons. He says that there is here no question of ambiguity. There is a mistake.

"All extrinsic facts which serve to show the state of the testator's property are to be looked at, and then the enquiry is whether in view of all these facts anything passes."[29]

There are many of our best lawyers, doubtless, who will adhere to the view that the dissenting Justices in *Patch* v. *White,* were right. It is not at all strange that these four members of the court should have felt it to be their duty to abide by a line of previous decisions. But it is not too much to say that a deeper study into the subject of the true principles of interpretation will probably convert those of this way of thinking to the support of the later doctrine thus upheld by the Supreme Court of the United States.

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[29]Preliminary Treatise etc., p. 467. It is curious to note that, in this closely contested case, the four dissenting Justices were the junior members of the court. Of the thirteen judges who sat, counting from the beginning of the suit, six were on the side that prevailed, while seven were on the side that lost.